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CHARLES ELMORE BRADLEY
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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 30.

LAWRASON RIGGS, JR., Special Guardian,

Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR. as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,

Respondents.

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

BRIEF FOR PETITIONER.

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No. 30.

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

BRIEF FOR PETITIONER.

A writ of certiorari was granted on March 30, 1942 to review a decision of the Court of Appeals of the State of New York which determined Section 124 of the New York Decedent Estate Law to be invalid as repugnant to the Federal Estate Tax Law and to the supremacy and uniformity clauses of the Constitution of the United States.

Section 124 of the New York Decedent Estate Law (Chap. 709 of the Laws of 1930 set forth in the appendix), provides in substance that whenever it appears upon an accounting by an executor or other fiduciary that such executor or other fiduciary has paid a federal estate tax upon or with respect to any property required to be included in the gross estate of the decedent under the Fed-

eral Estate Tax Law, the amount of the tax so paid, except where the testator otherwise directs in his will, shall be equitably prorated among all the persons sharing in such taxable estate in proportion to their respective benefits.

Opinions Below.

The opinion of Surrogate Foley (R. 55) is reported in 175 Misc. 489, 23 N. Y. S. (2d) 943. The opinion of the Court of Appeals by Judge Rippey with whom Judges Finch, Lewis and Conway concurred (R. 62) reversing the Surrogate, and the dissenting opinion therein by Judge Desmond in which Chief Judge Lehman and Judge Loughran joined (R. 75) are reported in 287 N. Y. 61, 38 N. E. (2d) 131.

Jurisdiction.

The highest court of the State of New York having determined a state statute to be repugnant to the laws and Constitution of the United States, this Court had jurisdiction to grant a writ of certiorari pursuant to the provisions of Section 237 (b) of the Judicial Code (28 U. S. C. §344 (b)).

Statement of the Case.

Josephine del Drago died October 8, 1937, a resident of New York, leaving a will dated March 27, 1934, which was admitted to probate by the Surrogate's Court of New York County on April 6, 1938, and letters testamentary were issued by that Court on the same date (R. 15, 16, 32). Her estate was upwards of $1,000,000 (R. 19). By her will, after providing for certain small cash bequests and specific

bequests of her personal effects, she bequeathed $300,000 to her husband outright, and created a trust of $200,000 for the benefit of her stepson for life, with gift over upon his death. The residue of her estate she disposed of in trust for the benefit of her husband for life, with a gift over upon his death. Her will contained no reference to estate taxes and no direction with respect to the portion of the estate to be charged therewith (R. 49).

On January 31, 1940, the executors duly commenced a proceeding in the Surrogate's Court of New York County for a judicial settlement of their account (R. 1). Petitioner was appointed special guardian to represent the interests of the infant remaindermen of the residuary trust (R. 1, 2).

The account showed that the executors had paid approximately $230,000 to the Collector of Internal Revenue on account of the federal estate tax assessed against the estate (R. 24). By their petition and account, the executors asked the Surrogate to determine whether this payment should be equitably apportioned among all persons beneficially interested in the estate, pursuant to Section 124 of the New York Decedent Estate Law, the will being silent (R. 18, 24).

Giovanni del Drago and Marcel del Drago, beneficiaries of the outright bequest of $300,000 and the bequest in trust of $200,000 respectively, respondents here, answered the petition, setting forth specific objections to the constitutionality of Section 124 of the Decedent Estate Law and claiming that for this reason, no part of the amount of the tax should be apportioned against their general legacies but that the entire amount of the tax should be charged against the residuary trust (R. 24, 28). Petitioner, representing the infant remaindermen of the residuary trust, in his report as special guardian contended that the amount of the federal tax should be apportioned equitably among all beneficiaries according to the settled practice under Sec-

tion 124, and should not be charged wholly against the residuary trust (R. 32).

The chief constitutional ground asserted by the objectants was that Section 124 of the Decedent Estate Law was repugnant to the provisions of the Federal Estate Tax Law and therefore violated Article VI (the supremacy clause) of the Constitution of the United States. They also asserted unconstitutionality under Article I, Section 8 (the uniformity clause). The other grounds were not pressed in the Court of Appeals or considered by that Court.

After a hearing (R. 35), the constitutional objections of respondents Giovanni del Drago and Marcel del Drago to the apportionment of the federal tax were overruled by Surrogate Foley (*Matter of del Drago*, 175 Misc. 489, 23 N. Y. S. (2d) 943) (R. 55) and decrees dated November 19, 1940 and December 24, 1940 were duly made and entered accordingly in the Surrogate's Court of New York County (R. 5, 14).

From the parts of these decrees of the Surrogate's Court of New York County holding Section 124 constitutional and directing proration of the tax, the general legatees, Giovanni del Drago and Marcel del Drago, as authorized by the New York Constitution (Article VI, Section 7 (3)) and the Civil Practice Act (Section 588 (3)) appealed directly to the New York Court of Appeals on the ground that the only question involved on the appeal was the validity of a state statute under the Constitution of the United States.

The Court of Appeals, on November 27, 1941, reversed the determination of the Surrogate on the ground that Section 124 of the Decedent Estate Law was unconstitutional (*Matter of del Drago*, 287 N. Y. 61, 38 N. E. (2d) 131) (R. 62).

The Court of Appeals construed the Federal Estate Tax Law (which imposes a tax on the transfer of a decedent's estate) as providing that unless the testator otherwise directs, the weight of the federal tax must fall upon the residuary beneficiaries. There is no section of the Federal Estate Tax Law which in terms so provides and the construction adopted by the Court of Appeals was based upon its interpretation of the Federal Estate Tax Law and particularly Section 826 (b) of the Internal Revenue Code.

Having so construed the Federal Estate Tax Law it determined that Section 124 of the New York Decedent Estate Law (which requires that the burden of the Federal estate tax, after the state fiduciary "has paid" it to the federal collector, be apportioned among all beneficiaries unless the testator otherwise directs) was in conflict with the federal law.

By reason of this alleged conflict, it held that Section 124 of the New York Decedent Estate Law violated so much of Article VI of the Federal Constitution as provides that the laws of the United States shall be the supreme law of the land.

The Court of Appeals further believed, as we read its opinion (R. 71), that even if the Federal Estate Tax Law failed specifically to fix the ultimate burden of its tax, nevertheless mere Congressional silence did not give permission to the state so to do and therefore the supremacy clause prevented a state from legislating upon the subject.

Finally the Court of Appeals determined that a state statute could not legislate with respect to the burden of a federal tax by reason of so much of Article I of the Federal Constitution as provides that federal excises shall be uniform throughout the United States.

On January 19, 1942, petitioner moved for reargument in the Court of Appeals. This motion was denied on January 22, 1942 (R. 83). On the same date, petitioner moved that the order of remittitur of the Court of Appeals be amended to set forth the grounds of the decision. This motion was also denied on January 22, 1942, upon the ground that the Court's opinions showed that upon the appeal, a federal question was presented and necessarily passed upon (R. 83).

On February 16, 1942, an order was made by the Surrogate's Court of New York County upon the remittitur of the Court of Appeals (R. 84). On March 30, 1942, certiorari was granted by this Court (R. 89).

The Statutes Involved.

The statutes involved are the Federal Estate Tax Law and Section 124 of the New York Decedent Estate Law.

The Federal Estate Tax Law applicable to the estate of this decedent, who died on October 8, 1937, is Title 3 of the Revenue Act of 1926 as amended and Title 2 of the Revenue Act of 1932 as amended. For convenience, instead of referring to particular sections of these Revenue Acts, reference will be made to the Internal Revenue Code, the sections of which, relevant to the present controversy, are taken without change from these prior Revenue Acts. Certain sections of the Internal Revenue Code (Sec. 812(d) and Sec. 826), which are to be discussed in detail are set forth in the appendix to this brief.

Section 124 of the New York Decedent Estate Law (Chap. 709 of the Laws of 1930) determined to be repugnant to the Federal Estate Tax Law and the Federal Constitution is also set forth in full in the appendix.

Section 249-t of Article 10-C of the New York Tax Law (Chap. 710 of the Laws of 1930), in so far as it incorporated by reference the provisions of Section 124 of the New York Decedent Estate Law, was also apparently included in the condemnation of the Court of Appeals (R. 75). Section 249-t on its face appears to have reference only to the apportionment of state estate taxes, a matter expressly not considered by the Court of Appeals and not in issue here (R. 75). But in any event since it raises no issue apart from that raised by Section 124 of the Decedent Estate Law, it will not be further referred to or considered here.

The Question Presented.

The question is whether Section 124 of the New York Decedent Estate Law is repugnant to the Federal Estate Tax Law and violates the supremacy or uniformity clauses of the Federal Constitution.

The Importance of the Question.

In order that the far-reaching effect of the decision made by the New York Court of Appeals in the present case be fully understood it is appropriate to review briefly the history of the application of the federal estate tax to the estates of New York decedents.[1]

The general scheme adopted in the first modern Federal Estate Tax Law enacted in 1916 has been followed in all subsequent enactments. It imposed a tax upon the trans-

[1] In the last three years for which figures are available (1936-1938) federal estate taxes from New York decedents amounted to over $300,000,000—over one-third of the total estate taxes for the country as a whole during the same period (U. S. Treasury Department, Statistics of Income for 1936, Part 1, p. 69; idem for 1937, Part 1, p. 96; idem for 1938, Part 1, p. 248).

fer of the owner's estate at his death (Revenue Act of 1916, secs. 200 *et seq.*; 39 Stat. 777). The amount of the tax was to be fixed by applying progressively graduated rates to the value of the net taxable estate. The net taxable estate was determined by deducting a specific exempted sum and the amount of debts, administration expenses and certain other specified items from the gross taxable estate. The value of the gross estate was determined by the inclusion of the value of the property subject to the charges against the estate, the value of *inter vivos* transfers in contemplation of or intended to take effect at death and the value of interests held jointly by the decedent and another.

The rates then provided were low. For example, a net taxable estate of $100,000 (after deductions and the specific exemption) was subject to a tax of only $1,500. A net taxable estate of $1,000,000 was subject to a tax of only $41,000.

In 1919 the New York Court of Appeals decided *Matter of Hamlin*, 226 N. Y. 407, 124 N. E. 4, cert. denied 250 U. S. 672. The testatrix in that case died on January 3, 1917, leaving a will executed in 1907, in which after certain cash bequests she created a residuary trust of the bulk of her estate. Her estate was subject to the 1916 Federal Estate Tax Law. Her executors having paid a federal estate tax showed in their account in the state court that each cash bequest was charged with a portion of the amount of the Federal estate tax paid by them. Objections were filed by the cash legatees who contended that the entire amount of the tax should be borne by the residue. The Court of Appeals sustained the objections of the cash legatees. This case in the absence of any opposing state statute established a judicial rule in New York that executors should charge the entire amount of the federal estate tax to the residue when the testator had not provided to the contrary.

In 1924 the New York Court of Appeals in *Farmers Loan & Trust Co.* v. *Winthrop*, 238 N. Y. 488, 144 N. E. 769, cert. denied 266 U. S. 633 extended this rule (Lehman, J., now Chief Judge, who dissented in the present case, writing) to charge the residuary beneficiaries not only with the tax resulting from true estate property but with that part of the tax which resulted from the inclusion of an *inter vivos* trust in the taxable estate.

Experience proved that the application of this rule in many cases resulted in inequities and hardship to the immediate members of the decedent's family who were generally the residuary legatees (see *Matter of Mary Benson*, 120 Misc. 136, 198 N. Y. Supp. 663; 1 Paul, Federal Estate and Gift Taxation (1941) 774; Karch, The Apportionment of Death Taxes, 54 Harv. L. Rev. (1940) 10, 34; Reports to the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes, Vol. 2, Pt. 2, p. 135 (1933)).

In 1927 a Commission was appointed by the New York Legislature to investigate defects in the laws of estates in New York (Chapter 519, Laws of 1927). This Commission was composed of fifteen members including the surrogates of four of the largest communities in the State, and legislators and lawyers eminent in the field of decedents' estates (Report of the Commission, N. Y. Legis. Doc. [1928] No. 70, p. 5). The painstaking work of this Commission and the many improvements in the laws of decedents' estates resulting therefrom are too well known to require enumeration. The constitutionality of one of these legislative reforms designed for the further protection of the surviving spouse has recently been sustained by this Court. *Irving Trust Co.* v. *Day*, 314 U. S. 556.

In the fall of 1929 the Commission, at the invitation of the Governor and the State Tax Commission, took under

advisement improvements in the law of inheritance taxation.[1] In cooperation with the State Tax Commission it recommended:

(1) abolition of the old New York transfer tax and in its place a New York estate tax similar to the federal estate tax (Chapter 710 of the Laws of 1930);

(2) legislation for compromising the amount of the transfer tax upon certain estates where under the old transfer tax final determination of the tax had been postponed pending the happening of contingencies (Chapter 711 of the Laws of 1930);

(3) legislation to provide a method of equitably apportioning the estate tax (both federal and state) as against the respective benefits derived by the various persons interested in the estate where the testator did not direct otherwise (Chapter 709 of the Laws of 1930, Report of the Commission, N. Y. Legis. Doc. [1930] No. 69, p. 195).

In its note to this last provision the Commission reported in part (N. Y. Legis. Doc. [1930] No. 69, p. 227; (this note, printed with the original bill as presented to the state legislature, appears in 13 McKinney's Consol. Laws of N. Y., p. 420)):

> "The principal objection to an estate tax has been that where the decedent dies leaving a will, and makes no provision therein to the contrary, the en-

[1] This Court in relating the history of inheritance taxation in New York has taken notice of this "inquiry into the defects and inadequacies of a taxing system born of other times and calculated to meet different needs", *Whitney* v. *Tax Commission*, 309 U. S. 530, 536 (wherein the constitutionality of certain legislation designed to cover the hiatus between the old New York transfer tax and new estate tax was upheld).

tire burden of the tax must be borne by the residuary legatee or legatees. Experience has demonstrated that in most estates the residuary legatees are the widow, children, or nearer and more dependent relatives. This has been one of the objections to the Federal Estate Tax Law in New York. The burden of the tax has been imposed upon the residuary legatees not only as to the property passing under the will, but also upon transfers whether by gift or *inter vivos* trust, or other form of transfer taking effect at death. These transfers are included both in the Federal Estate Tax Law and under the proposed New York Estate Tax Law as subject to taxation. Thus the residuary legatees have been compelled to pay the entire estate tax, including the tax assessed on testamentary transfers and those taking effect at death. It was held by the Court of Appeals that the Federal Estate tax is required to be paid out of the general estate without any right of apportionment among the respective beneficiaries (Farmers' Loan & Trust Co. *v.* Winthrop, 238 N. Y. 488; Matter of Oakes, 248 N. Y. 280; Matter of Hamlin, 226 N. Y. 407).

The foregoing proposed section 124 of the Decedent Estate Law was drawn by the commission appointed to investigate defects in the laws of estates and the representatives of the New York State Tax Commission for the purpose of providing statutory authority for an equitable apportionment of the estate taxes—both Federal and State—as against all transfers of property included in the gross estate. The section as drafted authorizes the surrogate in an accounting or other appropriate proceeding (where all persons interested shall have been given notice) to hear the respective claims of the parties and to make an equitable proration or apportionment of the estate taxes. The decree of the surrogate may direct the payment by any transferee of the share

of the taxes apportioned against such transferee. Of course, if the will directs the method or source of the payment of the estate taxes no apportionment can be made in violation of its terms; thus the testator, in his discretion, may provide for the method and source of the payment of the tax. In Edwards *v.* Slocum, 287 Fed. Rep. 651 (aff'd 264 U. S. 61), Judge Hough of the United States Circuit Court of Appeals, Second Circuit, pointed out that the Federal Estate Tax Act does not determine the incidence of the tax which it imposes, but that each state is at liberty to determine according to its own laws in what manner the federal estate tax shall be borne by the persons interested in the estate (See also Hill *v.* Grisson, 299 Fed. Rep. 641)."

Pursuant to the concurrent recommendation of these two state commissions Section 124 of the New York Decedent Estate Law was enacted in 1930 at a time when declining values accentuated the inequities of the existing rule.

The effect of this enactment was to change the then existing judicial rule in New York and require that the amount of the federal estate tax be apportioned among all beneficiaries of the taxable estate unless the testator directed to the contrary.

Since 1930 it has been customary for draftsmen of wills to advise their clients that if the latter say nothing, the burden of death duties will follow the benefit and that if their clients should wish taxes to be paid out of the residuary estate, the will must so provide.

Between the time of its enactment in 1930 and the decision in the present case in November of 1941, Section 124 was continuously applied by the New York courts and has been frequently recognized by the Court of Appeals. *Matter of Duryea*, 277 N. Y. 310, 14 N. E. (2d) 369; *Matter of Rogers*, 249 App. Div. 238, 291 N. Y. Supp. 815, leave to

appeal denied 273 N. Y. 680; *Matter of Stanfield*, 257 App. Div. 932, 12 N. Y. S. (2d) 1022, leave to appeal denied 281 N. Y. 887. It has withstood attack on other constitutional grounds in the Court of Appeals. *Matter of Scott*, 274 N. Y. 538, 10 N. E. (2d) 538, cert. denied 302 U. S. 721.

It is no exaggeration to say that in thousands of estates in New York federal estate taxes have been apportioned in accordance with its terms.

Then eleven years after its passage, the Court of Appeals in this case has declared it to be invalid so far as federal estate taxes are concerned. The immediate consequences of the decision are enormous. It may fairly be said that there are hundreds of estates now in the process of administration in New York which are seriously affected. In the intervening eleven years the federal rates have been increased[1] and interests not originally included in the gross taxable have been added to it, *e. g.* irrevocable trusts where the grantor has reserved a life interest and reversionary interests (Internal Revenue Code §811; *Helvering* v. *Hallock*, 309 U. S. 106). Testators, whose wills are now in the process of administration, had sought, under the guide set up in Section 124, to secure for the natural objects of their bounty certain portions of their property. In many instances these carefully made plans will be wrecked if the decision stands.

---

[1] The following will serve as an example:

Net Taxable Estate	Tax Under Revenue Act of 1926 (applicable to decedents dying between 1926 and 1932)	Tax Under Revenue Act of 1941 (applicable to decedents dying after September 21, 1941)
$ 100,000	$ 300*	$ 20,380*
1,000,000	9,700*	290,260*
10,000,000	270,700*	5,014,520*

* After maximum credit allowed for state inheritance taxes.

There are many persons now living whose wills have been drawn in the light of Section 124. Many testators in the natural course of human conduct will not, and many because of incapacity or infirmity cannot, revise existing wills to make the changes rendered necessary by this decision to preserve their actual wishes. Their testamentary plans are jeopardized or destroyed.

The question involved here is also of importance in Pennsylvania which in 1937 enacted a statute similar to Section 124 of the New York Decedent Estate Law (Purdon's Pa. Stat. Ann. 20 P. S. §844) and in other states which by judicial decision have assumed the right to deal locally with the incidence of the federal estate tax.

A Specification of the Errors to be Urged.

The Court of Appeals erred:

1. In construing the Federal Estate Tax Law as placing the ultimate burden of the tax upon the net residuary estate where the will is silent, and, having so construed the Federal Estate Tax Law, in holding Section 124 of the Decedent Estate Law to be repugnant to the Federal Estate Tax Law and to so much of Article VI of the Federal Constitution as provides that the laws of the United States shall be the supreme law of the land.

2. In holding that even though Congress may have failed to fix expressly the ultimate burden of the tax, a state may not constitutionally supplement such omissions from the Federal act.

3. In holding that Section 124 of the Decedent Estate Law was repugnant to so much of Article I of the Federal Constitution as provides that Federal excises shall be uniform throughout the United States.

Summary of Argument.

I.

The Federal Estate Tax Law provides only for the payment of the tax and does not care upon whom the ultimate burden falls. Section 124 of the New York Decedent Estate Law does not conflict or interfere with the purposes of the federal statute.

The Federal Estate Tax Law imposes a tax on the transfer of the decedent's estate, measured by its aggregate net value. It requires an executor, a state fiduciary, to pay out of the aggregate funds in his hands the tax so imposed. After the tax has been paid to the collector the estate is closed so far as the Federal Government is concerned.

Section 124 of the New York Decedent Estate Law, by its express terms, does not become operative until the state fiduciary "has paid" the tax. It is only at a later date, when the state fiduciary comes to account for his acts as such fiduciary before the appropriate tribunal and shows that he "has paid" the tax, that the Surrogate in directing distribution of the estate equitably apportions the amount of the tax paid among the several beneficiaries pursuant to Section 124 if the Will does not provide otherwise.

Such an apportionment does not affect the amount or the collection of the tax by the Federal Government.[1] The Federal Government has no interest and is not concerned

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[1] Where a will makes a residuary bequest to charity, the way in which the burden of the tax falls may affect the amount of the tax because in this instance the federal statute itself directs that the burden of the tax as determined by state law shall be taken into consideration in computing the amount of the charitable deduction. This is discussed at pages 40-46, *infra*.

with the matter. There is no conflict or interference with the operation of the Federal Estate Tax Law or with its purposes. Such purposes are wholly fulfilled when the tax is paid.

II.

Section 124 of the New York Decedent Estate Law does not violate the supremacy clause of the Federal Constitution there being no actual conflict or interference.

Applicable decisions of this Court establish that a state statute, within the ordinary sphere of state legislation, will not be stricken down unless there is actual interference with the operation of a federal statute or with its purposes.

The power of the Federal Government to levy and collect an estate tax is granted by the Constitution.

The power of the states to regulate the distribution of estates is reserved to them under the Constitution. Section 124 of the Decedent Estate Law providing for apportionment of the burden of the federal tax among the several beneficiaries was enacted pursuant to this power. Its effect is to regulate the distribution of the balance of the estate remaining after taxes have been paid.

If there was an actual conflict between these state and federal statutes, it might be necessary to ascertain which of the two statutes exceeded its constitutional powers. For the supremacy clause lends no support to a federal statute which for purposes irrelevant to its power to levy and collect taxes arbitrarily interferes with rights reserved to the states. Since, however, no actual conflict exists in this case—the federal purpose of laying and collecting a federal

tax (U. S. Const., Art. I, Sec. 8) being completed before the state statute by its very terms commences to operate—both statutes are wholly consistent and therefore must be sustained.

III.

There is not even a theoretical conflict between Section 124 of the New York Decedent Estate Law and the Federal Estate Tax Law. By its terms the Federal Estate Tax Law does not fix the final burden of the tax; it leaves this determination to the law of the state having jurisdiction over the estate.

The New York Court of Appeals did not attempt to show where Section 124 actually interfered with the federal statute or its purposes. It construed the federal law as providing that the burden of the tax must fall on the residuary estate unless the testator otherwise directs. Because the state statute provides that the burden of the tax after its payment shall be equitably apportioned among all beneficiaries unless the testator declares to the contrary, the majority found a technical conflict between the two statutes. But the majority of the Court of Appeals incorrectly construed the federal law.

The federal law leaves the burden of the tax to state law. So construed not even a theoretical repugnancy exists between the statutes. So construed the federal statute does not violate the requirement of the Federal Constitution of geographic uniformity.

IV.

Section 124 of the New York Decedent Estate Law is valid as applied to Josephine del Drago's estate because it does no more than impose a condition on her privilege of making a will. Congress by necessary implication left this control of the will making privilege to the states by expressly permitting a will maker to determine the final burden of the tax.

The Federal Estate Tax Law expressly authorizes a testator to determine the incidence of the tax by his will.

It is therefore necessary to examine Mrs. del Drago's will to ascertain its meaning. It is well settled that since she was domiciled in New York the meaning and effect of her will is to be governed by the law of New York.

Admittedly her testamentary document is silent on the subject of estate taxes, but her silence under New York law means that taxes must be apportioned among the several beneficiaries as indeed Surrogate Foley pointed out (R. 57). For Section 124 says that unless the testator specifically provides otherwise, he is presumed to have intended proration of taxes. Such a provision is a usual and valid condition to the privilege of making a will; or if not a condition to its making, is a valid canon for its construction.

Since the federal law concededly permits the burden of taxes to be fixed by will, and since Mrs. del Drago has done so by her silence, no conflict can exist and no question of repugnancy arises.

POINT I.

The Federal Estate Tax Law provides only for the payment of the tax and does not care upon whom the ultimate burden falls. Section 124 of the New York Decedent Estate Law does not conflict or interfere with the purposes of the federal statute.

Section 124 does not conflict with the purposes or aims of the federal tax law, the sole purpose of which when first enacted in 1916 was to increase the revenue of the Federal Government to meet preparedness appropriations (53 Cong. Rec. 10657). This purpose is completed so far as an individual estate is concerned when the state fiduciary has paid the tax to the federal collector.

Subsequent to 1916 rates were greatly increased. If it be said that the increase in rates was not only to raise additional revenue but, in the case of large estates at least, to exact high taxes with the purpose of reducing concentrations of wealth (1 Paul, Federal Estate and Gift Taxation (1941) 28 *et seq.*), this aim too is accomplished upon the exaction of the tax and its payment to the collector. It is no part of the purpose or aim of federal law to determine which of the several estate beneficiaries shall bear the final burden of the tax after the collector has received the tax; the law expressly authorizes a testator to determine this burden as he chooses (Internal Revenue Code, Sections 826 (b), 812 (d)).

The facts in the case at bar will serve to illustrate the total absence of any repugnancy between the federal and state statutes.

This decedent died on October 8, 1937, leaving an estate of upwards of $1,000,000. Pursuant to the Federal Estate Tax Law, which requires the executor to file a return and pay the tax, such a return was filed and the tax amounting to approximately $230,000 was paid and the state fiduciaries obtained their tax receipt. The estate then became closed so far as this payment to the Federal Government was concerned. The estate had previously come within the orbit of the federal statute and the terms of the statute had been complied with.

After this payment, the executors brought a proceeding in the appropriate state court for judicial approval of their acts and transactions as fiduciaries of the estate (R. 1) asking certain instructions with respect to the disposition of the balance of the estate remaining in their hands after the payment of the charges against the estate including this tax payment (R. 17). The Federal Government was not an actual, necessary, or proper party to this proceeding.

In this state court proceeding Section 124 of the New York Decedent Estate Law became then operative. Pursuant to its terms the Surrogate decreed that the amount of the tax which had been paid over a year before to the Federal Government should be equitably apportioned among all of the various beneficiaries under the will and the balance of the estate be distributed accordingly. This determination of the Surrogate was of no more concern to the federal estate tax authorities than if the Surrogate had then determined that the will was invalid and the balance of the estate should pass as intestate property. It was a question which involved only the beneficiaries under the will or, in the case of intestacy, the next of kin.

POINT II.

Section 124 of the New York Decedent Estate Law does not violate the supremacy clause of the Federal Constitution there being no actual conflict or interference.

The right of the Federal Government to impose an estate tax arises from the express grant of power to Congress contained in the Federal Constitution (Art. I, Sec. 8) to lay and collect taxes. *Knowlton* v. *Moore*, 178 U. S. 41; *New York Trust* v. *Eisner*, 256 U. S. 345.

In *Knowlton* v. *Moore*, it was argued that, since the transmission of property by death is exclusively subject to the regulating authority of the several states, the levy by Congress of a tax on inheritance in any form was beyond the power of Congress and an interference by the Federal Government with a matter which fell within the reach of state legislation alone.

In rejecting this contention and in holding that Congress could impose excise taxes irrespective of the source of the transfer taxed this Court at the same time acknowledged that the power to regulate the transmission of property was a matter exclusively for the states. See also *United States* v. *Fox*, 94 U. S. 315; *United States* v. *Perkins*, 163 U. S. 625; *Snyder* v. *Bettman*, 190 U. S. 249.

In *Irving Trust Co.* v. *Day*, 314 U. S. 556, the fundamental proposition that control of the transmission of property at death is a matter for the states, was recently reaffirmed.

The Federal Government has never in fact assumed the right to regulate inheritances. Alexander Hamilton considered such regulation clearly beyond the power of the

Federal Government. He said (The Federalist, No. XXXIII (1788) at p. 213 (Tudor 1937)):

> "Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the Federal legislature should attempt to vary the law of descent in any State, would it not be evident that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State?"

Thus the power of the Federal Government to tax the transmission of property at death does not arise from and is wholly distinct from the power of the states to regulate the transmission of such property.

The power of the Federal Government to tax is not an exclusive power. The several states have the power to and do impose death taxes. By 1932 all except one state in the Union had some form of death tax. (Reports to the Joint Committee on Internal Revenue. Taxation, Federal and State Death Taxes, Vol. 2, Pt. 2, p. 58 (1933)).

The co-existence of the Federal and state powers to tax has always been recognized. Hamilton, The Federalist, No. XXXII (1788) p. 206 (Tudor 1937); *Gibbons* v. *Ogden*, 9 Wheat. 1, 197; *Transportation Co.* v. *Wheeling*, 99 U. S. 273; *United States* v. *Perkins*, 163 U. S. 625; *Frick* v. *Pennsylvania*, 268 U. S. 473, 498.

It is important in considering any question of inconsistency to have in mind the non-regulatory non-exclusive character of the Federal power involved as distinguished from the state power which New York has exercised for the past eleven years under Section 124 of the Decedent Estate Law which places a condition on the testamentary privilege.

Attempted analogies in the relationship of other state laws to the exercise of other federal powers such as the power over interstate commerce, which may be both exclu-

sive and regulatory, are more likely to confuse than to clarify. Such supposed analogies led the Court of Appeals to the erroneous conclusion that even silence on the part of Congress with respect to the incidence of its tax would preempt the field and make any action by the states unlawful.

But for the reasons stated above, the levy or collection of the federal tax is not and cannot be disturbed by regulating the distribution of the balance of the estate remaining after the tax has been paid; the purposes of the federal statute have been fulfilled upon the payment of the tax and it is no part of the purpose of the federal government to direct upon which beneficiaries the burden of the tax shall fall.

It is not intended to deny to the Federal Government the power of directing upon whom the burden of its tax should fall after its payment in a case where such direction could be shown to be a reasonable and necessary adjunct to the exercise of its taxing power. But if the Federal Government should without reason seek to control the burden of its tax after its payment so as to render sterile the states' power to regulate the distribution of an estate, would not the question arise as to whether or not the federal statute had exceeded congressional power?

The supremacy clause goes no further than to sustain federal statutes exercised pursuant to federal powers. It does not sustain any exercise of the federal taxing power which encroaches upon rights reserved to the states. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541; *Linder* v. *United States*, 268 U. S. 5, 17; *United States* v. *Constantine*, 296 U. S. 287.

But this question need not be further discussed or answered here. It has been pointed out that the two statutes in the present case are in no wise inconsistent.

In dealing with alleged conflicts between coordinate powers it is necessary to determine whether any conflict in

fact exists. If no such conflict exists the exercise of both the state and federal powers is sustained. This court has upheld other state legislation in other situations involving alleged conflicts between coordinate powers where there was more appearance of actual conflict than in this case.

In *Whipple* v. *Martinson*, 256 U. S. 41, for instance it was alleged that a state statute regulating the sale of narcotics was invalid because it conflicted with the federal revenue anti-narcotic drug act. The federal statute permitted licensed physicians to dispense drugs; the state statute did not. In upholding the state statute the Court said at page 46:

> "There is certainly nothing in this state enactment, as construed by the Supreme Court of Minnesota, which interferes with the enforcement of the federal revenue law, and we agree with the state court that there is no conflict between the enactments such as will prevent the State from enforcing its own law upon the subject."

In *Plummer* v. *Coler*, 178 U. S. 115, there was an asserted conflict between the exercise of a conceded federal power to borrow money and the exercise of a conceded state power to levy an inheritance tax. A New York testator had bequeathed $40,000 in United States bonds to his executor in trust. The bonds had been issued by the federal government exempt "from * * * taxation in any form by or under state municipal or local authority". New York State sought to impose its inheritance tax on the *bequest*.

In upholding the state statute against this attack the court said at pages 137, 138:

> "But when the effort is made, as is the case here, to establish the unconstitutional character of a particular tax by claiming that its remote effect will be

> to impair the borrowing power of the government, courts in overturning statutes, long established and within the ordinary sphere of state legislation, ought to have something more substantial to act upon than mere conjecture. The injury ought to be obvious and appreciable."

In holding applicable to national banks a state statute prohibiting branch banking this court said in *First Nat'l Bank* v. *Missouri*, 263 U. S. 640, 659:

> "Clearly, the state statute, by prohibiting branches, does not frustrate the purpose for which the bank was created or interfere with the discharge of its duties to the government or impair its efficiency as a federal agency."

Recently this court has sustained the imposition of the New York income tax upon the salary of an attorney for the Federal Home Owners' Loan Corporation after finding that no actual burden was imposed upon the national government by the levy of the tax. *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 480.

It has already been pointed out that attempted analogies to cases involving disputes between federal and state action in the field of interstate commerce are of doubtful relevance to the case at bar. Nevertheless there are a number of cases in a portion of this field which illustrate the application of the rule which we apply here. In considering them it must be remembered that in the field of interstate commerce, since the power to regulate is expressly vested in Congress, federal statutes are undoubtedly supreme. *Gibbons* v. *Ogden*, 9 Wheat. 1. On the other hand, since the burden of the taxation on the several beneficiaries of estates is more closely connected with regulation of estates than with taxation, at least a serious doubt exists as to the application of the supremacy clause in the event of conflict.

The cases in the limited field of interstate commerce which might to some extent be analogous to the present case are those cases dealing with alleged conflicts between the exercise by a state of its police power and the exercise of a federal regulation of interstate commerce concerning subjects not demanding uniformity of regulation (*i.e.* excluding those cases where state action is altogether inadmissible even in the absence of federal action).

Even in the long line of cases where the Federal Government is supreme and the states may act only in the limited field which the Federal Government has not occupied the principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so "direct and positive" that the two acts cannot "be reconciled or consistently stand together." *Kelly* v. *Washington*, 302 U. S. 1, 10; *Sinnot* v. *Davenport*, 22 How. 227, 243; *Missouri K. & T. R. Y. Co.* v. *Haber*, 169 U. S. 613, 623, 624; *Reid* v. *Colorado*, 187 U. S. 137, 148; *Mintz* v. *Baldwin*, 289 U. S. 346, 350; *Savage* v. *Jones*, 225 U. S. 501, 533.

If the test is stated in broader terms and the attempt is made to ascertain in the present case whether Section 124 of the New York Decedent Estate Law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" the result is the same. See *Hines* v. *Davidowitz*, 312 U. S. 52, 67.

This federal act "can, with no propriety of language, be said to come into conflict with the law of a state, whose operation only begins when the law of Congress ends." See *New York* v. *Miln*, 11 Pet. 102, 138.

In the present case there not only is no conflict, but an actual accommodation of the power of the State to the rights of the Federal Government, and a harmonious exercise of the respective sovereignties of each, preserving to each necessary power. See *Thompson* v. *Kentucky*, 209 U. S. 340, 348.

We are not discussing a situation where conflict is direct and positive. We do not say that a state may enact a valid statute interfering with the collection of the federal tax (*United States* v. *Snyder*, 149 U. S. 210) or attempt to dictate the property which might be included in the gross estate so as to affect the amount of the tax in the absence of express or implied authority from Congress to do so. *Burnet* v. *Harmel*, 287 U. S. 103; *Lyeth* v. *Hoey*, 305 U. S. 188.

Nor do we seek a rule which would treat the power of the states to regulate the administration of a decedent's estate as unlimited. A state cannot of course use this power to discriminate against national banks in favor of its own banks in the right to act as executor. *Burnes Nat'l Bank* v. *Duncan*, 265 U. S. 17. Nor can a state exercise its power over estates of aliens, in contradiction to treaty obligations of the federal government. *Santovincenzo* v. *Egan*, 284 U. S. 30.

We do urge, however, that a state may fully exercise its power to regulate the estates of its decedents as it has done here where no actual conflict with the federal taxing power exists. Beneficial state legislation within the normal sphere of state action should not be stricken down on a claim based upon theoretical considerations. "Taxation is eminently practical." *Tyler* v. *United States*, 281 U. S. 497, 503.

We think that the absence of actual conflict is determinative of the issue in the present case, irrespective of the

wholly theoretical conflict upon which the majority of the New York Court of Appeals relied to sustain its decision.

POINT III.

There is not even a theoretical conflict between Section 124 of the New York Decedent Estate Law and the Federal Estate Tax Law. By its terms the Federal Estate Tax Law does not fix the final burden of the tax; it leaves this determination to the law of the State having jurisdiction over the estate.

Neither the majority of the New York Court of Appeals nor respondents have been able to point out an actual conflict between the operation and purposes of the two statutes here involved and none in fact exists.

What then is the conflict on which the Court of Appeals relied? The majority of that Court construed the Federal Estate Tax (by selecting one section from the entire law (Internal Revenue Code §826[b])) as placing the ultimate incidence of the tax upon the net *residuary* estate except where the testator directed to the contrary. It then determined that since Section 124 of the New York Decedent Estate Law provided that the amount of the tax after its payment should be prorated among all beneficiaries, again unless the testator directed to the contrary, the New York statute conflicted with the terms of the Federal Estate Tax Law where the testator was silent. On the basis of this conflict it held Section 124 to be unconstitutional.

It is an anomalous construction. It interprets the federal law as providing that an individual testator may determine the incidence as he sees fit, but a state, from whence the testator's privilege of making a will is derived, is power-

less to determine the incidence of the tax if the testator is silent on the subject.

The legislative history and background of the federal statute, its particular provisions and its interpretation by the courts neither compel nor permit any such construction. On the contrary the Federal Estate Tax Law expressly leaves the determination of the burden of the tax to the law of the state having jurisdiction over the estate.

The Legislative History and Background of the Federal Estate Tax Law.

In 1916 Congress faced with the necessity of increasing the revenue to meet expanding needs for preparedness, turned to death duties as an additional source of revenue.

At that time a political difficulty stood in the way of a federal death tax. That was the opposition of the states. Except for short periods, generally during wartime (a history and analysis of these statutes appears in *Knowlton v. Moore*, 178 U. S. 41) the states had been sole possessors of this source of revenue. By 1916 there were only five states in the Union which did not impose a death duty of some kind. (Reports to the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes, Vol. 2, Pt. 2, p. 57 (1933)).

Once it became known that Congress proposed to tap this source of revenue many state governments transmitted resolutions to Congress opposing the measure upon the grounds that it would be a serious encroachment upon a source of state revenues and would result in double taxation (53 Cong. Rec. 2803, 6625, 10537, app. 1404). Opposition to the bill on the same grounds was expressed on the floor of the House by numerous members (53 Cong. Rec. 10603, 10647, 10730, app. 1499, app. 1708). Indeed practi-

cally the entire discussion of the revenue bill so far as it dealt with the estate tax revolved around this question.

The particular type of tax which the Federal government proposed to enact obviously did not concern the states; they opposed any such tax. The type of Federal tax proposed was what is now familiarly known as an "estate" tax rather than an "inheritance" tax.

The reason for the selection by Congress of this type of tax resulted largely from the experience of the states with "inheritance" taxes. In 1916, 42 of the 43 states imposing death duties levied inheritance taxes. These acts imposed a tax on the right to receive property from a decedent. The tax was measured by the amount of the specific inheritance and in most states the tax rates increased with the size of the inheritance. All of the states recognized the principle of consanguinity, direct heirs being taxed at a lower rate than collateral relatives. (Reports to the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes, Vol. 2, Pt. 2, p. 57 (1933)). In order to determine the amount of the tax it was necessary to determine both the amount of the inheritance and the identity of the recipient. This made it necessary to resort to the terms of the will or statute of distribution. Where future interests were created under the will it was frequently necessary to resort to the courts to determine the nature of such interests and the identity of the persons entitled thereto (*e. g. Uterhart* v. *United States*, 240 U. S. 598). When such interests were contingent, either payment of the tax had to be postponed or a temporary deposit made to await the happening of the contingency.

By its nature a tax of this type rendered it necessary to consider the many complicated problems which might arise in connection with the construction of wills and trusts, the

application of probate laws, and the determination of the rights of the particular legatees.

> "These problems would be especially difficult in the case of the Federal Government, as the regulatory control over the passing of property at death is reserved to the States and there is a great divergence in the various State laws."

(Reports to the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes, Vol. 2, Pt. 2, p. 103 (1933)).

That Congress in 1916 was aware of these difficulties is abundantly clear from the discussions on the floor and in committee. The existence of these difficulties in fact was the fundamental reason for proposing an estate tax, to be measured by the value of the estate without reference to the beneficiaries receiving the property, rather than an inheritance tax. (This distinction is described in *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61, 62; *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, 155.)

Representative Kitchin, Chairman of the Ways and Means Committee, in explaining to the House the nature of the estate tax prior to its enactment in 1916, made this clear (53 Cong. Rec. app. 1942):

> "We levy an entirely different system of inheritance tax. We levy the tax on the transfer of the flat or whole net estate. We do not follow the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. This also prevents the Federal Government, through the Treasury Department, going into the courts contesting and construing wills and statutes of distribution."

The Ways and Means Committee of the House of Representatives then reported:

> "Your Committee deemed it advisable to recommend a federal estate tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees.
>
> The federal estate tax recommended forms a well balanced system of inheritance taxation as between the federal government and the various states, and the same can be readily administered with less conflict than a tax based upon the shares." (H. R. Rep. No. 922, 64th Congress, 1st Sess., C. B. 1939-1, Pt. 2, p. 25).

A member of the House in considering the federal bill and after pointing out that the proposed federal estate tax was imposed on the mass of the estate, inquired as to how the executor was to apportion the burden of the tax after it had been paid (53 Cong. Rec., app. 1495). Except for his inquiry there appears to be no other reference to it other than the statement of the Honorable Cordell Hull then a member of the House of Representatives that (53 Cong. Rec. 10657):

> "Under the general laws of descent the proposed estate tax would be first taken out of the net estate before distribution, and distribution made under the same rule that would otherwise govern it. Where the decedent makes a will he can allow the estate tax to fasten on his net estate in the same manner, or if he objects to this equitable method of imposing it upon the entire net estate before distribution he can insert a residuary clause or other provision

in his will, the effect of which would more or less change the incidence of the tax."

Congressman Hull's reference in the above passage to "the same rule that would otherwise govern it" obviously referred to the rule of distribution imposed by state law. In effect he said this: In intestate estates the balance of the estate remaining after the tax has been paid shall be distributed pursuant to state law; in the estates of testators the balance of the estate remaining after payment of the tax shall be distributed in accordance with applicable state law or the testator can make special provision for the tax burden if he does not wish the general state law to be applied.

The conclusions to be drawn from the legislative history are:

(1) Since the burden of the tax after its payment had no bearing on the collection or amount of the tax, it played no part in the considerations of Congress.

(2) The burden was to be left to the determination of state law.

Section 826(b) of the Internal Revenue Code.

In arriving at their anomalous construction of the Federal Estate Tax Law, the majority of the Court of Appeals in this case relied entirely on this single section of the law (Section 826(b) of the Internal Revenue Code). This section has a far different meaning than the one the Court adopted.

The Revenue Act of 1916, as have all subsequent enactments, imposed a tax on the "net estate"[1] computed as provided by the act and required the executor to file the return and pay the tax (39 Stat. 779). That law as well as subsequent laws provided a remedy in the event the tax was not paid when due. In such event the government was authorized by Section 208 of the Act to subject the property of the decedent to sale and to apply the proceeds to the tax (39 Stat. 779). The tax was made a lien upon the entire estate of the decedent for ten years unless the tax was sooner paid (39 Stat. 780).

In providing for the sale of the decedent's property if the tax was not paid when due, Section 208 contained an additional sentence which was added without discussion by a Senate amendment to the House bill (H. R. Report No. 1200, 64th Cong., 1st Sess. 1916, C. B. 1939-1, Pt. 2, p. 39). This sentence has been continued in all subsequent revenue acts without change. It is now Section 826(b) of the Internal Revenue Code and reads as follows:

> "(b) *Reimbursement out of estate.* If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is sub-

[1] The "net estate" for tax purposes is a wholly artificial figure determined by subtracting statutory deductions and exemptions from a statutory "gross estate." The "net estate" for tax purposes has no relation to the true net estate distributable to beneficiaries under a will or to distributees in intestacy and of course it has no relation to the net residuary estate, distributable to the residuary legatees under a will.

> ject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

The first part of this sentence presents no real problem. It says: If any beneficiary pays the tax, he shall be entitled to an equitable contribution from all other beneficiaries whose interests are subject to the burden of a portion of the tax as that burden is fixed by state law. (Obviously no legal distinction was intended to be drawn between "reimbursement" and "contribution".)

In providing for contribution between persons whose interest in the estate is "subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate"; there is a clear indication that state law was to control the burden of the tax. The burden of "debts, or other charges against the estate" is of necessity determined by state law and the inclusion of the word "taxes" implies that the burden of the federal tax is to be similarly fixed.

The second part of Section 826(b) provides:

> "• • • it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

These words seem merely to be carrying out the thought of the Honorable Cordell Hull noted above: (1) That in intestate estates the tax shall be paid by the administrator and the balance of the estate including the burden of the tax shall be distributed pursuant to state law; (2) that in testate

estates the tax shall be paid by the executor and that either the balance of the estate including the burden of the tax shall be distributed as provided by state law generally or specific direction may be given by the testator as to the burden of the tax.

This must be its meaning if the problem is looked at from the point of view of the actuality of estate administration.

Normally under state law specific legacies, demonstrative legacies and general legacies are paid in full, before anything is distributable to residuary legatees. Consequently under state law generally, debts administration expenses and other charges against the estate fall mathematically upon the residuary estate.

For this reason the majority of state courts, by treating the tax as any other charge against the estate, have held that the burden of the federal estate tax falls upon the residue by operation of applicable state law where the testator does not otherwise provide. *Amoskeag Trust Co.* v. *Dartmouth College,* 89 N. H. 471, 200 Atl. 786; *Plunkett* v. *Old Colony Trust Co.,* 223 Mass. 471, 124 N. E. 265; *People* v. *Northern Trust Co.,* 289 Ill. 475, 124 N. E. 662; *Brown's Estate* v. *Hoge,* 198 Iowa 373, 199 N. W. 320; *Corbin* v. *Townshend,* 92 Conn. 501, 103 Atl. 647.

By the same token if there is no residue, then the tax would fall in accordance with the applicable state law relating to the order of abatement of general legacies, demonstrative legacies and specific legacies. Certainly there is nothing in Section 826(b) which says how the tax is to be borne if there is no residue.

Or if the residue consists partly of real property and partly of personal property, the burden of the tax would fall by operation of state law upon the personal property if such was the applicable local law relating to charges and

the will contained no provision to the contrary. *Hepburn v. Winthrop,* 83 F. (2d) 566 (App. D. C.).

Under the intestate law of many states the rules governing the descent of real property and the rules governing the distribution of personalty are different. It is also true under most state laws that debts and administration expenses are primarily chargeable against the personalty. Thus the normal result would be that under many state laws the federal estate tax would be charged pursuant to state law against the personalty. In *New York Trust Co.* v. *Eisner,* 256 U. S. 345 a suit by executors of a will attacking the constitutionality of the Federal Estate Tax Law it was erroneously conceived that this unequal imposition of the burden of the tax in intestate estates resulted from Section 826(b) of the Internal Revenue Code and that the federal law was, by reason of this inequity, unconstitutional. In answer to this argument and in effect saying that the final burden of the tax was a matter of state law Mr. Justice Holmes said (p. 349):

> "As to intestate successors the tax is not imposed upon them but precedes them and the fact that they may receive less or different sums because of the statute does not concern the United States."

Accordingly the phrase "it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution" as applied to testamentary estates, means no more than that the United States looks to the estate as a whole. But after the executor has paid the tax, the estate including the burden of the tax is left to be distributed pursuant to applicable state law and a testator may himself vary the ordinary rule of state law if he so desires.

Section 826(b) does not contain a command by Congress, as the New York Court of Appeals apprehended (without, however, offering an explanation for the phrase "so far as is practicable"), that the burden of the tax must fall on the *residuary* estate notwithstanding state law. (Indeed it does not mention the residuary estate at all.) It contains no command that state statutes affecting distribution must remain static or that a state cannot make such changes in its laws as it sees fit.

Section 826(c) of the Internal Revenue Code.

The Revenue Act of 1916 contained no provision for the inclusion in the taxable estate of life insurance of the decedent payable to named beneficiaries.

The 1918 Act added a provision making such insurance in excess of $40,000 includable in the gross estate. The Committee on Ways and Means stated that it had been brought to its attention that "wealthy persons have and now anticipate resorting to this method of defeating the estate tax" (H. R. Report No. 767, 65th Cong., 2d Sess. 1918, C. B. 1939-1, Pt. 2, p. 102).

At the same time that Congress enacted this section, it included what is now Section 826(c) of the Internal Revenue Code without discussion and under the general statement that "minor changes in verbiage and slight modifications in procedure have been made for the sake of insuring more equitable, uniform and efficient administration of the law" (H. R. Report No. 767, 65th Cong., 2d Sess. 1918, C. B. 1939-1, Pt. 2, p. 103).

Section 826(c) of the Internal Revenue Code provides:

> "(c) *Liability of life insurance beneficiaries.* If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent

receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio."

Since the legislative record is silent on the subject, it is permissible to hazard a guess as to the reason for the enactment of this provision. Life insurance payable to third persons, as the House Ways and Means Committee was clearly aware (H. R. Report No. 767, 65th Cong., 2d Sess. 1918, C. B. 1939-1, Pt. 2, p. 101), involved a contract between the named beneficiary and the insurance company. It was not, unlike transfers made in contemplation of or intended to take effect on death, traditionally treated as estate property. See *Washington Central Bank* v. *Hume*, 128 U. S. 195. This consideration as well as the apparent equities of the situation may have led Congress to enact this provision placing the weight of the resulting tax on insurance beneficiaries.

Courts have argued from this that the express apportionment of the burden with respect to insurance excluded any thought that Congress had directed the balance of the tax to be apportioned (*Bemis* v. *Converse*, 256 Mass. 131, 134, 140 N. E. 686, 687; see *Farmers' Loan & Trust Co.* v. *Winthrop*, 238 N. Y. 488, 144 N. E. 769, cert. denied 266 U. S. 633). However this may be, we do say there is nothing in Section 826(c) to warrant the claim that Congress did not leave the determination of the ultimate burden of the balance of tax to be determined by local law.

Section 812(d) of the Internal Revenue Code and *Edwards* v. *Slocum*.

The construction of the Federal Estate Tax Law which we urge has been adopted and approved by the executive, the federal courts and Congress.

In 1924 when Congress amended the provisions of the Federal Estate Tax Law relating to the deduction of charitable bequests, it expressly recognized that the final incidence of its estate tax was a matter of state law. To understand the significance of this amendment, which is now Section 812(d) of the Internal Revenue Code, it is appropriate to review its history.

By an amendment in 1919 the Federal Estate Tax Law for the first time allowed the amount of charitable bequests to be deducted from the gross estate in computing the net taxable estate (40 Stat. 1098).

In *Edwards* v. *Slocum*, 287 Fed. 651, aff'd 264 U. S. 61, a question arose under this 1919 amendment between the Collector and the executors of the will of a New York decedent as to whether in computing the charitable deduction the amount of the residuary bequest to charity should be reduced by the amount of the federal estate tax. The executors contended that the amount of the charitable deduction was the value of the net residuary estate without subtraction of the amount of the federal estate tax. The Collector contended that the amount of the charitable deduction was the net residuary estate less the amount of the federal estate tax because under New York law the amount of the tax would be chargeable against the residuary legatees and the residuary legatees actually would only receive the net residuary estate reduced by the amount of the federal estate tax.

The Circuit Court of Appeals for the Second Circuit sustained the position of the executors on the ground that, the net estate for tax being an artificial figure used as a measure for determining the tax itself, to deduct the tax would require regarding the incidence of the tax in its computation; furthermore that it would be unjustifiable to impute to Congress an intent that such a special subtraction from charitable gifts be made since the incidence of the tax was a matter of state law which would vary from state to state. Judge Hough writing for a unanimous court, as to the incidence of the tax as a matter of local law, said:

> "So far as the words of this statute are concerned, the United States does not care who ultimately bear the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter. The New York courts have settled it, so far as this estate is concerned, by the Hamlin case, *supra* * * *." (p. 653)

This opinion that state law governed the incidence of the tax was fundamental to the argument because in pointing out that it would be unreasonable to impute to Congress the intent to so reduce the charitable deduction, he said:

> "But all states do not treat the incidence of the tax as does New York; and if distributees were ratably assessed by the tribunal of administration to pay the estate tax, or if all estate taxes were treated as 'a charge against the estate,' the reasoning by which this tax is supported would fail. The result would be confusion, again something not to be imputed to the act if it can be avoided." (p. 654)

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[1] The judicial rule established in the *Hamlin* case was changed by Section 124 of the New York Decedent Estate Law.

Later in his opinion carrying out this same thought he said:

> "By its regulation of the incidence of the tax, New York does in fact diminish in favor of the United States what the charities receive; but it must be wrong for the executive departments of the United States to use the rule of incidence, which is of state creation to increase its own exactions * * *." (p. 655)

The next point of significance is that, when the Government appealed to this Court (by James M. Beck, Solicitor General, and Alfred A. Wheat, Special Assistant to the Attorney General) it, in Point I of its brief, adopted as its own the proposition of the Circuit Court of Appeals as a "fundamental and conceded proposition," as follows:

> "So far as the words of this statute are concerned, the United States does not care who ultimately bears the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the State courts can settle the matter."

It was upon this definite statement of the law, which counsel for the Government insisted was fundamental, that counsel proceeded to argue that under the terms of the Federal tax statute the amount of the deduction allowable in computing the tax should be determined by what the charities actually were to receive.

It was upon this fundamental law that the two New York commissions, working together, acted in writing Section 124 into their series of new tax laws. It is the identical proposition which because of the startling decision of the majority of the Court of Appeals we are now here seeking to restore and sustain.

This Court affirmed on February 18, 1924 (*Edwards* v. *Slocum*, 264 U. S. 61). In his opinion Mr. Justice Holmes, after stating that:

> "The executors prevailed in the District Court and Circuit Court of Appeals after a discussion with which the government well might have remained satisfied * * *" (p. 62),

pointed out that in its position the Government was:

> "* * * inconsistent with itself also in maintaining that while the distribution of the burden of taxation among the several beneficiaries is a matter of state regulation, the residue is not to be diminished by the state inheritance tax but only by the estate tax of the United States." (p. 63)

In *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50, which was argued on the day following the *Slocum* case, Chief Justice Taft again indicated that the burden of the tax was a matter of state law. The tax there had been paid to the federal government, and the estate was closed so far as it was concerned. The question was between the beneficiaries as to where the burden of the tax should fall. The charitable residuary legatees contended that no part of the estate tax should fall upon their legacies, since Section 403 (3) of the Revenue Act of 1918 provided that the amount of charitable bequests should be deducted from the gross taxable estate in order to determine the net taxable estate. From this provision, the charitable residuary legatees argued that the manifest purpose of Congress was to exempt the beneficiaries under subdivision (3) from tax and the result of the construction by the Ohio courts was to place erroneously the entire burden of the tax upon the residuary estate. In answer to this argument Chief Justice Taft said at page 50:

> "There is nothing in subdivision (3) of §403 which exempts the recipients of altruistic gifts from taxation; it only requires a deduction of them in calculating the amount of the estate which is to measure

> the tax. It exempts the estate from a tax on what is thus deducted just as subdivision (4) exempts in terms the estate from taxation on its first $50,000; but this does not operate to exempt any legatee who may be entitled to the first $50,000 in the distribution, from deduction to contribute to the tax ultimately imposed, *if by the law of the State, such should be its incidence.*" (Italics supplied.)

The significance of these views thus unanimously expressed (though dismissed by the majority of the Court of Appeals in the present case as dicta) lies in the fact that when Congress enacted in 1924 what is now Section 812(d) of the Internal Revenue Code in order to change the result reached in the *Slocum* case, it adopted this "fundamental" and (by the Government) "conceded" proposition that the final burden of the weight of the tax is a matter of local law. The language of Section 812(d) is as follows:

> "If the tax imposed by section 810 [the federal estate tax] or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the laws of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes."

This enactment recognized in express terms that the burden of this tax or of any estate, succession, legacy or inheritance tax might be determined "by the terms of the will" or "by the law of the jurisdiction under which the estate is administered" or "by the law of the jurisdiction imposing the particular tax". Conforming with Judge Hough's proposition that the United States was not inter-

ested after it had collected its tax, Congress made no attempt here to direct by which one of these methods the burden of the federal estate tax was to be determined, and it is self-evident, we urge, that Congress intended that the burden of the tax could be determined "by the law of the jurisdiction under which the estate is administered".

Article 44 of U. S. Treasury Regulations 68 (1925), interpreting this amendment read in part:

> "* * * if a residuary estate, or a portion thereof, be bequeathed to charity, *and by local law* the Federal estate tax is payable out of the residuary estate, the deduction may not exceed that portion of the residuary estate bequeathed to charity as reduced by the Federal estate tax." (Italics supplied.)

This portion of the regulation is meaningless unless it is to be read in conformity with the Government's fundamental proposition that it is not concerned with the burden of the federal tax and that that is a matter of local law. (The same provision appears in Regulations 80, Article 44 (1937) and Regulations 105, Section 81.44 (1942).)

The Revenue Act of 1926 did not originally contain this amendment of the 1924 act, but in 1932 the 1926 act was amended so as to include it (47 Stat. 282).

In reporting on the revenue bill of 1932, the Senate Finance Committee, in explaining the proposed reenactment of the 1924 amendment, said in part (Sen. Rep. No. 665, 72d Cong., 1st Sess., C. B. 1939-1, Pt. 2, p. 534):

> "The Supreme Court on February 18, 1924, in the case of *Edwards* v. *Slocum* (264 U. S. 61), held that, as a matter of construction, a residuary gift to charity was not to be reduced by the Federal estate tax which was imposed on so much of the estate as the testatrix had bequeathed to individuals. Under

> the State law the estate tax was payable generally out of the estate and so fell upon and reduced the residuary estate given to charity. As a legislative reversal of the decision in that case, the sentence referred to was incorporated in the Revenue Act of 1924 and covered Federal estate taxes as well as State inheritance taxes where, *either by the terms of the will or by the local law,* any such tax operated to reduce the amount given to and received by charity." (Italics supplied.)

Where a testator makes a residuary bequest to charity, the way in which the burden of the tax falls may affect the amount of the tax. It is of significance that in the only situation in which it may make the slightest difference to Congress from the standpoint of revenue who bears the final burden of the tax, Congress has expressly permitted state law to determine the burden.

Section 812(d) has been continued in all revenue acts subsequent to 1932 and it was, of course, a part of the Federal Estate Tax Law applicable to the estate of this decedent.

Decisions Construing the Federal Estate Tax Law as to the Burden of the Federal Tax.

We know of no federal case which holds, or even declares by way of *dictum,* anything contrary to the succinct statement concurred in, as has been indicated above, by the Treasury Department, the Department of Justice, Congress and this Court, that:

> "So far as the words of this statute are concerned, the United States does not care who ultimately bear the weight of this tax; it announces the sum and demands payment from the executors; if the legatees

and devisees cannot agree as to the burden bearing, the state courts can settle the matter. The New York courts have settled it, so far as this estate is concerned, by the Hamlin case, *supra* * * *." (p. 653) (*Edwards* v. *Slocum*, 287 Fed. 651, 653)[1]

We have pointed out that the majority of state courts, by treating the tax as similar to debts and other charges against the estate, have applied the usual state rule and charged the tax against the residue (see p. 36 above). Some have done so with the express recognition that the incidence was a matter of local law. *Amoskeag Trust Co.* v. *Dartmouth College*, 89 N. H. 471, 200 Atl. 786; *Gaede* v. *Carroll*, 114 N. J. Eq. 524, 169 Atl. 172; *Henderson* v. *Usher*, 125 Fla. 709, 170 So. 846; *Thompson* v. *Union & Mercantile Trust Co.*, 164 Ark. 411, 262 S. W. 324; see *Hepburn* v. *Winthrop*, 83 F. (2d) 566 (App. D. C.).

The cases in New York decided prior to the enactment of Section 124 of the Decedent Estate Law in 1930 in charging the burden of the tax against the residue reached the same result as most of the other state decisions. *Matter of Hamlin*, 226 N. Y. 407, 124 N. E. 4, cert. denied 250 U. S. 672 (decedent died in 1917); *Farmers Loan & Trust Co.* v. *Winthrop*, 238 N. Y. 488, 144 N. E. 769, cert. denied 266 U. S. 633 (decedent died in 1918); *Matter of Oakes*, 248 N. Y. 280, 162 N. E. 79 (decedent died in 1919, rec. on app. fol. 313). In so far as they purported to rely on an interpretation of the Federal Estate Tax Law which "commanded" that the burden of the tax should fall on the residuary estate, they appear to have been decided on reasoning unnecessary for the decision. In those cases the Federal Estate Tax Law applicable to the estates therein before the court did not

[1] As we have pointed out the judge made rule of the *Hamlin* case was changed by the legislature by the enactment of Section 124 of the Decedent Estate Law.

contain the subsequent amendment which is now Section 812(d) of the Internal Revenue Code; in each case the decedent had died several years prior to 1924.

The Pertinent Rules of Construction Support the Interpretation of the Federal Estate Tax Law Here Presented.

The construction here presented gives effect to the fundamental purpose of Congress in enacting an estate tax rather than an inheritance tax—that of avoiding conflict with the states. (See *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 464).

To give the act a contrary construction—and thus to negative the right of the state to regulate the balance of the estate remaining after the tax is paid—would impute to Congress a purely arbitrary design to interfere with the state's right to regulate inheritances and its estates and cast doubt upon the constitutionality of its own act (see Point I above). Such a construction is to be avoided. (*Palmer* v. *Massachusetts*, 308 U. S. 79, 84.)

The construction which we propose is in accordance with the rule which favors the constitutionality of state acts. (*Corporation Commission* v. *Lowe*, 281 U. S. 431, 438.)

It avoids an absurd, harsh and unnecessary construction. (*Haggar Co.* v. *Helvering*, 308 U. S. 389, 394; *Burnet* v. *Guggenheim*, 288 U. S. 280, 285; *Heydenfeldt* v. *Daney Gold & Silver Min. Co.*, 93 U. S. 634, 638.)

It is absurd, we urge, to construe a federal law for the collection of a tax as placing the incidence of the tax upon the residuary estate where the federal government cannot have the slightest concern as to whether the testator's residuary beneficiaries, as contrasted with his specific pecuni-

ary beneficiaries, shall bear the entire burden of the tax if the will happens to be silent. There are many instances where there is no residuary estate and it raises the question as to what, in any given instance, may be a *residuary* estate, the very kind of question sought to be avoided by Congress.

It would be a harsh construction because, contrary to the declared policy of the state of New York, it places the final burden entirely upon those whom the state legislature after full investigation by two state commissions, believes the testator, if silent on the subject, would naturally intend to be the protected objects of his bounty.

It is an unnecessary construction because it is in no way relevant to the purpose of the act and does not affect the amount or collection of the federal tax.

By its terms, the apportionment provided by the state law does not become effective until the tax has been paid and so far as the federal government is concerned the estate has been closed.

A Construction to Permit State Law to Govern the Final Incidence Would not Render the Act Violative of the Uniformity Clause of the Federal Constitution.

To permit the state law to govern the final incidence of the tax, does not give to the Federal Estate Tax Law a construction which would render it invalid under the constitutional requirement of geographic uniformity (U. S. Const. Art. I, Sec. 8). In *Phillips* v. *Commissioner*, 283 U. S. 589, where the constitutionality of the transferee liability provisions of a Federal Income Tax Law[1] were chal-

[1] The Federal Estate Tax Law contains a provision similar to the section of the Income Tax Law considered in the Phillips case (Internal Revenue Code, Sec. 900).

lenged for lack of uniformity on the ground that the incidence of the tax thereby imposed was left to local law, Mr. Justice Brandeis stated (p. 602):

> "The extent and incidence of Federal taxes not infrequently are affected by differences in state laws; but such variations do not infringe the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity. Florida *v.* Mellon, 273 U. S. 12, 17; Crooks *v.* Harrelson, 282 U. S. 55; Poe *v.* Seaborn, 282 U. S. 101, 117."

Because the Federal Estate Tax Law provides that the gross estate of the decedent shall be determined by including the value of all property to the extent of the interest of the decedent at the time of his death, the amount of the tax may frequently be affected by state law by necessary implication, (*e. g.*, state law as to community property). There are at least three provisions in the Federal Estate Tax Law under which the amount of the federal estate tax is affected by state law by express direction of Congress. Debts administration expenses and certain other items "as allowed by the laws of the jurisdiction . . . under which the estate is administered" are deductible from the gross taxable estate (Internal Revenue Code, Sec. 812 (b)). The amount of the charitable deduction from the gross taxable estate may depend upon the burden of the federal tax "as determined by the laws of the jurisdiction under which the estate is administered" (Internal Revenue Code, Sec. 812 (d)). A credit against the federal tax is allowed for the amount of any estate, inheritance, legacy, or succession taxes actually paid to any state (Internal Revenue Code, Sec. 813).

POINT IV.

Section 124 of the New York Decedent Estate Law is valid as applied to Josephine del Drago's estate because it does no more than impose a condition on her privilege of making a will. Congress by necessary implication left this control of the will making privilege to the states by expressly permitting a will maker to determine the final burden of the tax.

In this final point we assume solely for the purposes of argument that the New York Court of Appeals properly construed the Federal Estate Tax Law. Under its construction it would follow that Section 826(b) of the Internal Revenue Code must be assumed to mean that "it is the intent of Congress that unless otherwise directed by the will of the decedent, the burden of the tax shall be borne by the residuary beneficiaries."

Whatever meaning is placed upon Section 826(b), both that Section and Section 812(d) specifically leave the determination of the burden of the tax to the testator's will.

Thus before the burden of the tax in Mrs. del Drago's estate can be determined it is necessary that the meaning and effect of her will be ascertained.

Under well settled principles, since Mrs. del Drago died domiciled in New York, the meaning and effect of her will are to be determined under the law of the State of New York. *Uterhart* v. *United States*, 240 U. S. 598; 2 Beale, Conflict of Laws. (1935) 1034, 1036, 1038.

The testamentary instrument itself is silent, but under the New York law of wills her silence in this instance, as in many other instances[1] has meaning. Section 124 of the New

[1] E.g. a power of appointment is deemed to be exercised where the will is silent (Sec. 18 N. Y. Personal Property Law). And see Sections 13, 26, 38, 41, 47a, 47b, 47c of N. Y. Decedent Estate Law.

York Decedent Estate Law provides in effect that unless Mrs. del Drago said affirmatively to the contrary, her will is to be construed as providing that the tax shall be equitably borne by all persons sharing in the estate. As we have shown in Point I, New York has the power to impose a condition upon or even abolish the testamentary privilege.

> "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." (*Irving Trust Co.* v. *Day*, 314 U. S. 556, 562)

Consequently, construed as it must be under the law of New York Mrs. del Drago's will provided for the apportionment of taxes just as much as if such a clause had been physically embodied in her will. *Irving Trust Co.* v. *Day*, 314 U. S. 556, 563; *Matter of Bergdorf*, 206 N. Y. 309, 316, 99 N. E. 714, 717.

Since this is merely what Congress specifically authorized to be done, no conflict can possibly exist between the Federal Estate Tax Law and Section 124 of the New York Decedent Estate Law.

Once respondents concede, as indeed they must, that a testator is authorized by Congress to provide in his will for the burden of the tax, they have destroyed any conceivable basis upon which conflict might be claimed.

Conclusion.

The order of the Court of Appeals of the State of New York and the order of the Surrogate's Court of New York entered on the remittitur of the Court of Appeals should be reversed.

Dated: September 10, 1942.

Respectfully submitted,

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Appendix.

The Statutes Involved.

Section 124 of the New York Decedent Estate Law (Laws of 1930, c. 709):

"§124. Apportionment of federal and state estate taxes; executor or administrator to deduct taxes from distributive shares.

1. Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity, has paid a death tax levied or assessed under the provisions of article ten-c of the tax law, or under the provisions of the United States revenue act of nineteen hundred twenty-six, as amended by the United States revenue act of nineteen hundred twenty-eight, or under any death tax law of the United States hereafter enacted, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except in a case where a testator otherwise directs in his will,[1] shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made by the surrogate in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that in making such proration allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions

[1] The only amendment to Section 124 since its enactment in 1930 has been the addition in 1940 of a second exception clause, "and except in a case where by written instrument executed inter vivos direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such inter vivos instrument." Laws of 1940, c. 829, §13.

allowed by such act for the purpose of arriving at the value of the net estate; and except that in cases where a trust is created, or other provision made whereby any person is given an interest in income, or an estate for years, or for life, or other temporary interest in any property or fund, the tax on both such temporary interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary estate. For the purposes of this section the term 'persons interested in the estate' shall have the same meaning with respect to both state and federal taxes as is given it by section two hundred forty-nine-m of the tax law.

So far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid by the executor as such out of the estate before its distribution. In all cases in which any property required to be included in the gross estate does not come into the possession of the executor as such, he shall be entitled, and it shall be his duty, to recover from whomever is in possession, or from the persons interested in the estate, the proportionate amount of such tax payable by the persons interested in the estate with which such persons interested in the estate are chargeable under the provisions of this section, and the surrogate may by order direct the payment of such amount of tax by such persons to the executor.

No executor, administrator or other person acting in a fiduciary capacity shall be required to transfer, pay over or distribute any fund or property with respect to which a federal or state estate tax is imposed until the amount of such tax or taxes due from the devisee, legatee, distributee or other person to whom such property is transferred is paid, or, if the apportionment of tax has not been determined, adequate security is furnished by the transferee for such payment.

2. The surrogate, upon making a determination as provided in subdivision one of this section, shall make a decree or order directing the executor or other fiduciary to charge the prorated amounts against the persons against whom the tax has been so prorated in so far as he is in possession of property or interests of such persons against whom such charge may be made and summarily directing all other persons against whom the tax has been so prorated or who are in possession of property or interests of such persons to make payment of such prorated amounts to such executor or other fiduciary.

3. This section shall not apply to estates of persons dying prior to September first, nineteen hundred thirty."

Section 812(d) of the Internal Revenue Code (26 U. S. C. §812 (d)) (derived from Section 303 (a) (3) of Title III of the Revenue Act of 1926, as amended in 1932 (47 Stat. 282), without change).

Section 812 provides that for the purpose of the tax the value of the net estate shall be determined by deducting from the value of the gross estate:

"(d) *Transfers for public, charitable, and religious uses.* The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * *. If the tax imposed by section 810, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes. The amount of the

deduction under this subsection for any transfer shall not exceed the value of the transferred property required to be included in the gross estate. (53 stat. 123.)"

Section 826 of the Internal Revenue Code (26 U. S. C. §826) (derived from Section 314 of Title III of the Revenue Act of 1926 (44 Stat. 79) without change):

"§826. *Collection of unpaid tax*—(a) *Sale of property.* If the tax herein imposed is not paid on or before the due date thereof the collector shall, upon instruction from the Commissioner, proceed to collect the tax under the provisions of general law; or appropriate proceedings may be commenced in any court of the United States having jurisdiction, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. This subsection in so far as it applies to the collection of a deficiency shall be subject to the provisions of sections 871 and 891.

(b) *Reimbursement out of estate.* If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the

estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

(c) *Liability of life insurance beneficiaries.* If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio. (53 Stat. 127.)"